SECOND DEPARTMENT HOLDS "LIVE-IN" AIDES MUST BE PAID FOR ALL 24 HOURS OF A LIVE-IN SHIFT

Labor & Employment Alert
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After nine months of deliberation, the Second Department has issued two decisions addressing how "live-in" home health aides should be paid for live-in shifts. In unanimous opinions, the Court held that live-in aides who are not residential employees are entitled to be paid minimum wage for all 24 hours of their "live-in" shifts, regardless of whether the aides are afforded sleep and meal periods. *See Andryeyeva v. New York Health Care, Inc.*, ____ A.D.3d ___ (2d Dept. 2017) and *Moreno v. Future Care Health Services, Inc.* ___ A.D.3d ____ (2d Dept. 2017).

Moreno and *Andryeyeva* have similar backgrounds. Both cases were filed by home health care aides on behalf of themselves and all "similarly situated" employees (the "plaintiffs"), alleging that their home care agency employers violated minimum wage and overtime laws by failing to paid the aides for 24 hours of work when the aides worked "live-in" shifts. Relying on well-established Department of Labor guidance and Department of Health standards, the home care agencies contended that they complied with the law by paying the "live-in" aides for work time, and that the aides were not working when they slept and had meals. Indeed, among other guidance, a 2011 Department of Labor opinion letter advises that live-in employees "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals." The Department's opinion letter expressly states that the 13-hour rule applies regardless of whether the "live-in" employee is a residential or non-residential employee. Thus, the agencies in *Moreno* and *Andryeyeva* contended that they were entitled to exclude from the work time computation eight hours for the live-in aides' sleep time (assuming the aide received at least 5 hours of uninterrupted sleep per shift) and three hours for meal periods. The plaintiffs, however, asserted that the Department's opinion letter was inconsistent with the Department's regulation, which stated that:

> "minimum wage shall be paid for the time an employee is . . . required to be available for work at a place prescribed by the employer . . . . However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be . . . required to be available for work . . . during his or her normal sleeping hours solely because he or she is required to be on call during

Attorneys

Peter Godfrey

John Godwin

Practices & Industries

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> such hours; or . . . at any other time when he or she is free to leave the place of employment." *See* 12 NYCRR 142-2.1

Thus, plaintiffs argued, the regulation permitting the exclusion of meal periods and sleep time from work hours applied to residential employees, not non-residential employees such as them. Consequently, the plaintiffs asserted they were entitled to be paid for all 24 hours of a live-in shift.

The court agreed with the plaintiffs, holding, in *Andryeyva*:

> On this appeal, the defendants and the plaintiffs do not dispute the status of the putative members of the class as nonresidential employees. Thus, we must determine whether the DOL's interpretation of the Wage Order is rational or reasonable insofar as it permits NYHC's payment practices with respect to nonresidential aides. We agree with our colleagues in the Appellate Division, First Department, that the DOL's interpretation is neither rational nor reasonable, because it conflicts with the plain language of the Wage Order (*see Tokhtaman v Human Care, LLC*, 149 AD3d 476, 477… The plaintiffs were required to be at the clients' residences and were also required to perform services there if called upon to do so. To interpret that regulation to mean that the plaintiffs were not, during those nighttime hours, "required to be available for work" simply because it turned out that they were not called upon to perform services is contrary to the plain meaning of "available" … In short, to the extent that the members of the proposed class were not "residential" employees who "live [d] on the premises of the employer," they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals…"

In *Moreno*, the Second Department held:

> "To the extent that the DOL's opinion letter fails to distinguish between "residential" and nonresidential employees, it conflicts with the plain meaning of 12 NYCRR 142-2.1(b), and should not be followed ... To the extent that the members of the proposed class were not "residential" employees who "live[d]" on the premises of their employer, they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals…"

The court in *Moreno* and *Andryeyeva* certified the class of home care aides, allowing the cases and claims against their agency employers to proceed.

These are significant decisions for the home care industry, which has traditionally based its compensation structure for live-in aides based on good faith reliance on the Department of Labor's interpretation of its regulation. The agencies' compensation practices, excluding meal periods and sleep time from the definition of "work time" is also consistent with well-established wage and hour law. Nonetheless, with *Andryeyva* and *Moreno*, and *Human Care* in the First Department (*see Tokhtaman v. Human Care, LLC*, 149 AD3d 476 (1st Dept. 2017), home care agencies are advised to carefully consider their exposure to claims for past unpaid minimum wage and overtime from aides who worked live-in cases. In New York, these claims can go back six years. Agencies that currently provide live-in services should carefully examine whether to continue doing so, especially since there is no indication as to whether the Department of Health will change the reimbursement structure for live-in cases.

This firm represented the New York State Association of Health Care Providers in the *Andryeyeva* appeal, and the motion for leave to appeal in *Tokhtaman v. Human Care, LLC*. We are currently evaluating options for taking an appeal of the Second Department's decisions.

If you have questions about these cases or their impact on your business, please let us know.